No. 465

WAYNE APARTMENTS, Inc.,
LAREDO APARTMENTS, Inc.,
YORK APARTMENTS, Inc.,
9225 BROADSTREET CORPORATION,
NORTHWEST APARTMENTS, Inc.,
Michigan Corporations,
Petitioners,

vs.

MICHIGAN UNEMPLOYMENT COMPENSATION
COMMISSION,

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Supreme Court of the United States

OCTOBER TERM, 1943

No. .....

WAYNE APARTMENTS, Inc.,
LAREDO APARTMENTS, Inc.,
YORK APARTMENTS, Inc.,
9225 BROADSTREET CORPORATION,
NORTHWEST APARTMENTS, Inc.,
Michigan Corporations,
Petitioners,

vs.

MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Michigan and Brief in Support Thereof

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, pray this court for the issuance of a writ of certiorari to the Supreme Court of Michigan

to review a final order of that court entered the 7th day of September 1943, denying rehearing of its judgment entered June 7, 1943.

BASIS OF JURISDICTION

Jurisdiction of this court is invoked because the opinion and decision of the Supreme Court of the State of Michigan denies petitioners their constitutional protection of due process under the Fourteenth amendment of the Federal Constitution.

QUESTION PRESENTED

Involved herein is the constitutionality of the so-called "affiliate" clause of Section 41 of the Michigan Unemployment Compensation Act (Act No. 1, Section 41 (3) Public Acts of 1936, Ex. Session as amended by Act No. 347 Public Acts of 1937 and which reads:

> "Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise) and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (one) of this section."

The attack on the so-called "affiliate" clause as being repugnant to the Fourteenth Amendment to the Federal Constitution was asserted in petitioners' petition for Certiorari filed in the Circuit Court for the County of Wayne (Detroit) (R. page 5), wherein said clause was

condemned as unconstitutional, and again in the Supreme Court of Michigan where on reversal its constitutionality was sustained (R. pages 64-69).

SUMMARY STATEMENT OF MATTER INVOLVED

On September 5, 1939, one, Ruby Evick, filed a claim with the Michigan Unemployment Compensation Commission for unemployment benefits. At a hearing before the referee, the following undisputed facts were established. The claimant was employed by the Northwest Apartments, Inc., from August 15th, 1938 to September 15, 1938; by the Wayne Apartments, Inc., from September 15, 1938 to October 17, 1938; by the 9225 Broadstreet Corporation from October 17, 1938 to March 1, 1939.

George Levey actively managed the Wayne Apartments, Inc., the 9225 Broadstreet Apartments, Inc., the Laredo Apartments, Inc., the York Apartments, Inc., and the Northwest Apartments, Inc. During the calendar years 1938 and 1939, the above-named corporations, if treated as a single unit for the purpose of counting the number of individuals in employment, had in employment eight or more individuals in each of twenty weeks within each of the said calendar years. Each corporation taken individually had less than eight individuals in employment at all times. The corporations by whom claimant was employed together did not employ eight individuals.

Each of the above named corporations was incorporated under the provisions of the Michigan General Corporations Act and in accordance with the Exempt Transactions Law, so-called, which law limits the number of

incorporators to 25 and requires each incorporator to sign the Articles of incorporation. Each corporation owns and operates one apartment house, except the Northwest Apartments, Inc., which has three.

The Board of Directors of each of said corporations is the same, being composed of George Levey, President; Mrs. George Levey, and Joseph G. Aller, Secretary and Treasurer. George Levey actively manages the business of each corporation.

The corporate structure of the said corporations is as follows:

Corporation	"A" Stock	"B" Stock	Date
Wayne Apartments, Inc.	$35,000	$1,000	Oct. 14, 1936
9225 Broadstreet Corp.	30,000	500	Jan. 5, 1937
Laredo Apartments, Inc.	35,000	500	March 30, 1937
York Apartments, Inc.	37,000	500	Sept. 24, 1937
Northwest Apts., Inc.	42,000	500	April 26, 1938

In each corporation the stockholders are divided into two classes, "A" stock and "B" stock. The "A" stock is common stock and in each instance carries no voting rights. The "B" stock is the voting stock in each corporation. All of the B stock in each corporation is owned by George Levey. The common stockholders in each corporation are different individuals.

These corporations were not formed as separate enterprises for the purpose of evading the Michigan Unemployment Compensation Act. The profits, if any, arising from the corporate business are divided among the stockholders in the form of dividends.

Finding that under the 'affiliate clause' the corporations collectively are a single employing unit, employing more than eight individuals, (even though each, individ-

ually, employes less than eight) the referee adjudged petitioners subject to the Michigan Unemployment Compensation Law. The circuit Court for Wayne County, reversed this finding, holding the 'affiliate clause' repugnant to the Fourteenth Amendment to the Federal Constitution. This ruling was reversed by the Supreme Court of Michigan sustaining its constitutionality, from which decision petitioners seek review by this court.

REASONS RELIED ON FOR THE ALLOWANCE

1. The Supreme Court of Michigan has decided a Federal question, (the constitutionality of the affiliate clause of the Michigan Unemployment Compensation Act), in a way conflicting with the determination of this Court in denying certiorari in

> *Independent Gasoline Company v. Bureau of Unemployment Compensation*, 190 Georgia 613; certiorari denied 61 S. Ct. 175,

wherein an affiliation clause substantially the same as that in Michigan was held by the Supreme Court of Georgia to be repugnant to the Fourteenth Amendment of the Federal Constitution.

2. The Supreme Court of the United States in Retirement Board vs. Alton Railroad Company, 295 U. S. 330-360, concluded

> "The provisions of the Act which disregard the private and separate ownership of the several respondents, treat them all as a single employer and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process."

The principle involved in the *Alton* case, *supra,* seems to use to be substantially the same as that involved in the affiliate clause at bar, and if so, the decision of the Supreme Court of the State of Michigan conflicts with the determination of this Court.

3. If this Court has not settled the question as to the constitutionality of the affiliate clause, then, an important question of Federal Law remains, which question has not been, but should be settled by this Court in view of the conflicting decisions of various State Courts:

Benner-Coryell Lumber Co., Inc., vs. Indiana Unemployment Compensation Board, 29 Northeastern 2d, 776; certiorari denied by the Supreme Court of the United States, 312 U. S. 698.

Independent Gasoline Company vs. Bureau of Unemployment Compensation, 190 Georgia 613; certiorari denied 61 S. Ct. 175.

Maine Unemployment Compensation Commission vs. Androscoggin Junior, Inc., 137 Me. 154.

New Haven Metal & Heating Supply Company v. Danaher, 128 Conn. 213.

State of Washington v. Kitsap County Bank, 10 Wash. 2nd 520.

Wiley Motors Inc., vs. Unemployment Compensation Commission of New Jersey 31 Atl. (2) 39.

Kellogg vs. Murphy 164 S. W. (2d) 285 (Mo.).
Godsol vs. Unemployment Compensation Comm. 302 Mich. 652.

There is appended hereto a schedule of the applicable sections of the Michigan Unemployment Compensation Act, (Act. 1, Public Acts 1936, Ex. Sess, as amended by Act 347 of the Pub. Acts of 1937), and Opinions of the Trial Court and Supreme Court of Michigan. (see Appendix).

A transcript of the Record in this case including the proceedings in the Supreme Court of Michigan is furnished herewith in accordance with Rule 38 of this Court.

Wherefore your petitioners respectfully pray that this Honorable Court be pleased to grant a Writ of Certiorari directed to the Supreme Court of the State of Michigan, requiring that Court to certify a full and complete transcript of Record in the above entitled cause to this Honorable Court for its review and determination.

And your petitioners will ever pray.

Alan J. Stone,
Joseph G. Aller,
Samuel H. Rubin,
Attorneys for Petitioners.

CERTIFICATE

We hereby certify that we are the attorneys for the petitioners herein, that the allegations of fact contained in said petition are true and that said petition in our opinion is well founded in Law as well as in fact.

Alan J. Stone,
Joseph G. Aller,
Samuel H. Rubin.

APPENDIX

SECTIONS OF MICHIGAN UNEMPLOYMENT COMPENSATION ACT

SEC. 40:

(This section has not been amended. It appears in Stat. Ann., 1942 Cum. Supp. as §17.542).

"Sec. 40. 'Employing unit' means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January one (1), nineteen hundred thirty-six (1936), had in its employ one (1) or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two (2) or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of the work."

SEC. 41, as amended by Act No. 347, Pub. Acts 1937:

"Sec. 41. Same; employer. 'Employer' means:

(1) Any employing unit which in each of twenty (20) different weeks within the current calendar year or within the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight (8) or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), including any employing unit (for which service deemed employment as defined by this act is or was performed during such current or preceding calendar year) subject (during such current or preceding calendar year) to the pay roll tax levied by title nine (9) of the social security act;

(2) Any individual legal entity or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this act;

(3) Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise) and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (one) of this section.

(4) Any employing unit which having become an employer under paragraph [one], [two], [three]

or [four] hereof, has not, under sections twenty-three [23] and twenty-five [25] of this act, ceased to be an employer subject to this act; or

(5) For the effective period of its election pursuant to section twenty-five [25] any other employing unit which has elected to become fully subject to this act."

OPINION OF TRIAL COURT

(Filed May 6, 1941)

On certiorari from the decision (October 23, 1940) of the Appeal Board of the Michigan Unemployment Compensation Commission, affirming a decision of the Referee, under the provisions of Section 38 of Act 1 of the Public Acts of the extra session of 1936, as amended. In March, 1939, Ruby Evick, a caretaker, claiming that she was entitled to compensation under said Act (Michigan Unemployment Compensation Law), filed her petition against George Levey for the period from August 1, 1938, to March 1, 1939.

The Referee, after hearing, (November 15, 1939) found that George Levey controlled and managed the Wayne Apartments, Inc., Laredo Apartments, Inc., 9225 Broadstreet Corporation, York Apartments, Inc., and Northwest Apartments, Inc., and that, therefore, the three said apartments which employed the claimant were subject employer under the Michigan Unemployment Compensation Act. (Sec. 41, Subdivision 3), and the petitioner entitled to benefits under the Act.

Claimant worked for a month (August 15, 1938—Sep-

tember 15, 1938) at Northwest Apartments, Inc., another month (September 15, 1938—October 17, 1938) at Wayne Apartments, Inc., and five months (October 17, 1938—March 1, 1939) at 9225 Broadstreet Corporation. Each of the companies is a duly organized corporation under the laws of Michigan. Each corporation employs less than eight individuals and the three corporations by whom petitioner was employed together do not employ eight or more individuals.

The corporate structure of the various corporations involved and their date of incorporation, together with the class of stock of each, is as follows:

Corporation	"A" Stock	"B" Stock	Date
Wayne Apartments, Inc.	$35,000	$1,000	Oct. 14, 1936
9225 Broadstreet Corp.	30,000	500	Jan. 5, 1937
Laredo Apartments, Inc.	35,000	500	March 30, 1937
York Apartments, Inc.	37,000	500	Sept. 24, 1937
Northwest Apts., Inc.	42,000	500	April 26, 1938

The above corporations were organized under the provisions of the Michigan General Corporations Act, in accordance to the Exempt Transaction Law, so-called, in which there are no more than twenty-five incorporators and each are required to sign the Articles of Incorporation. Each corporation represents a separate apartment house.

In 1936, George Levey, together with a group of individuals, purchased an apartment dwelling, incorporated the same under the laws of the State of Michigan, and called it the Wayne Apartments, Inc. All the people who were interested in purchasing this apartment dwelling signed the Articles of Incorporation and were, therefore, incorporators. The shares in each corporation were divided into voting and non-voting stock, as permitted under the Corporation Act. George Levey became man-

ager of each corporation at its inception, and he or his representatives received the voting stock for the purpose of efficient management of the corporate affairs. The profits arising from the corporate business, if any, are divided among the stockholders in the form of dividends.

In January, 1937, Levey and another and different group of individuals purchased another building located at 9225 Broadstreet, Detroit, and a corporation was organized and named 9225 Broadstreet Corporation. The organization was the same as that followed relative to the Wayne Apartments, Inc. As subsequent buildings were acquired, each was incorporated, but in no instance were the persons who organized new corporations identical with the persons in any other corporation, except George Levey, who held the voting stock. The Board of Directors in each corporation is the same.

It appears that no one of the corporations had, during the period in question, more than seven employees. If appellants are to be considered separately, therefore, none of them is subject to the Unemployment Compensation Act, and the Referee so held. It is the claim of the petitioner, however, and which claim was sustained, that the five corporations are owned and controlled by the same interests or individuals. In substance, it is the claim that the facts are such as to bring the parties within the scope of Subdivision 3 of Section 41 of the Act, which classifies an employer as:—

> "Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employ-

> ing units (by legally enforceable means or otherwise) and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (one) of this section."

The Referee, in the first instance, held that the Wayne Apartments, Inc., Laredo Apartments, Inc., 9225 Broadstreet Corporation, York Apartments, Inc., and Northwest Apartments, Inc., were subject employer under the Act, and claimant entitled to benefits thereunder, within the meaning of that portion of the Act above quoted.

Under Section 38 of the Statute, as amended by Act 324 of the Public Acts of 1939, the findings of fact made by the Appeal Board are conclusive in the absence of fraud. However, the Court is required to review the findings made on questions both of law and of fact, reviewing the decision on a question of fact in case "said decision of the Appeal Board is contrary to the great weight of the evidence." Under the specific terms of the statute the question here is whether the finding of the Appeal Board is, under the competent evidence taken before the Referee, in accord with the weight of such evidence and the law.

The conclusion of the Board that Northwest Apartments, Inc., Wayne Apartments, Inc., 9225 Broadstreet Corporation, where the petitioner admittedly worked from time to time, as well as the other two corporations where she did not work, are owned or controlled by the same interests, within the scope of Subdivision 3 of Section 41 of the Act, can be said on the record as made to be against the "great weight of the evidence."

Each corporation is a distinct and separate legal entity. Each corporation has separate books; issues its

own checks; files separate income tax returns; and separate Social Security returns. The common stockholders of each corporation are different from the common stockholders of every other corporation, and the only common ownership of stock in any of the corporations is that of George Levey, who owns all the voting stock in each of the corporations. So far as the evidence before this Court is concerned, each corporation is run separately, and apart, and distinct from every other corporation. The employees of one corporation do not work as employees of any other corporation. For efficiency of management, the voting stock is held by George Levey. Each corporation was organized separately; and the incorporation fees and franchise fees paid individually for each corporation. Under the General Corporation Act, each corporation must apply separately to come within the protection of the Michigan Workmen's Compensation Law. From a legal standpoint, each corporation is distinct and separate from the other. The conclusion reached by the Referee and affirmed by the Appeal Board that these plaintiff corporations are owned and controlled within the scope of the above section of the Act is, therefore, not substantiated by the record.

It follows that one corporation employing less than seven employees may not properly, on this record, be grouped with any of the other corporations, for the purpose of subjecting that corporation or group of corporations to the provisions of the Unemployment Compensation Act.

In the brief filed on behalf of appellants, the constitutionality of the Unemployment Compensation Act is atacked on various grounds. First, it is contended by appellants that the title to the Act embraced more than

one general object, and, therefore, violates Section 21 of Article 5 of the State Constitution. Second, that the Act, as construed, deprives appellants of their property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution, as well as violating the guaranties of the Bill of Rights in the State Constitution. Third, that it violates Section 16 of the Constitution of the State of Michigan, 1908, depriving appellants of due process of law and equal protection of the law.

It is contended in support of the first objection above raised by the appellants that the Statute makes provision for unemployment insurance or compensation, and, also for the establishing and maintenance of free public employment offices, i.e., two objects, in violation of the inhibition of the provision of the State Constitution as set forth in Section 21 of Article 5. The primary purpose of the Act intended by the Legislature was the protection of the public against the results of unemployment, a matter of public concern, and as such within the police powers of the State Legislature. The dual purpose of the Act, *viz.*, payment of unemployment insurance of compensation and the establishment of employment agencies, both tend to the accomplishment of the main purpose sought by the Act. The Act in question is, therefore, not open to the objection urged. See, *Loomis v. Rogers*, 197 Mich. 265; *People v. Brooks*, 224 Mich. 45; *Moore v. Harrison*, 224 Mich. 512.

We now come to the claim of the appellant that the section of the Act under discussion, *viz.*, Subdivision 3 of Section 41 of the Act, is unconstitutional because it operates to deny appellants the equal protection of the law, and violates their constitutional guaranty of due process of law.

None of the corporations in question employ more than seven individuals, and some of them not over three. Each corporation was organized under the laws of the State of Michigan at different times, and the capitalization of each is different. In each case, the stockholders are divided into two classes, "A" stock and "B" stock. The "A" stock is common in every instance, and the "B" stock is the voting stock in each corporation. George Levy owns the "B" stock in each corporation. However, the common stockholders of each corporation are different. That is, the common stockholders of the first corporation do not own any common stock in any other corporation, and so on, as to the common stockholders of the remaining corporations. There is no charge of fraud or evasion made against appellants relative to the tax involved.

The question, therefore, which we are called upon to decide under the foregoing objections is reduced to this: Does the ownership of the voting stock of each of the above corporations by George Levey and his common management of the corporations, subject such corporations to such control by him as to make their ownership or control the basis of classification for the purpose of imposing Unemployment Compensation (excise) taxes on such corporations, in the manner prescribed by the section of the Act under consideration?

In the recent case of *Brenner-Coryell Lumber Company, Inc., appellant v. Indiana Unemployment Compensation Board, appellee,* the precise issue that is raised in the instant case came before the Court. Because this Court believes that the reasoning in the Benner-Coryell Lumber Company case is controlling of the issues at bar, I am going to quote from the decision in that at length.

The court, speaking through Shake, J., said:

This case calls into question the validity of * * * the Indiana Unemployment Compensation Law. * * * Said section provides that the term 'employer' in said act means:

> " 'Any employing unit which together with one (1) or more other employing units, is owned or controlled directly or indirectly by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection.' "

"The language used is to be construed in connection with § 2 (g) (1) of said act, by which an employer is further defined as a unit having in its employ eight or more persons.

"The appellant is an Indiana corporation, with its office and principal place of business in the town of LaFontaine, Wabash County. It is engaged in the retail lumber business and employs less than eight persons. Its capital stock is represented by 90 shares, 60 of which are owned by Bertha J. Coryell. Said Bertha J. Coryell also owns 185 out of 300 shares of the common stock of the Fairmount Lumber Company, a domestic corporation engaged in the lumber business at Fairmount, in Grant County, and which likewise employs less than eight persons. Together, said corporations employ more than eight persons. The minority stockholders of the respective corporations are not the same persons. The state assessed unemployment compensation taxes against the appellant, which it paid under protest. It then brought this suit for a refund. The state answered, reciting the above facts; the appellant demurred to the answer; the

trial court overruled the demurrer; the appellant refused to plead further; and judgment was rendered in favor of the state. The error relied on is presented by the ruling on said demurrer.

"The appellant contends that the section of the Unemployment Compensation Law quoted above is *unconstitutional when applied to the facts admitted by the pleadings.* It asserts that the corporations concerned are separate and distinct legal entities, and that their classification for taxing purposes on the basis of the combined number of their employees violates § 1 of article 10 of the Constitution of Indiana, which provides for a uniform and equal rate of assessment and taxation, and the provision of the Fourteenth Amendment to the federal Constitution which guarantees to citizens (including corporations) equal protection of the laws. It is to be noted that no elements of fraud or intentional tax evasion are involved in this case, nor is there any showing of joint management of the two corporations or any other relationship between them beyond the fact that Bertha J. Coryell owns a controlling interest in the common stock of each. It is urged that to hold the statute valid as it is sought to be applied here, would unjustly penalize minority stockholders of corporations, who have no control over the transfer of stock not held by them, and are therefore powerless to prevent a majority of such stock from gravitating into the hands of one person who may at the same time own, or thereafter acquire, a controlling interest in another corporation, thereby subjecting, indirectly, said minority holders to the burden of taxes not imposed upon corporation otherwise situated.

"The taxes imposed by the Indiana Unemployment Compensation Law are excise and not property taxes. * * * * *

"The question which we are called upon to answer is therefore reduced to this: Do the owners of a majority of the stock of a corporation have such control thereof as to make their ownership or control the basis of classification for the purpose of imposing excise taxes on such corporations in the manner prescribed by the act under consideration? That a corporation is a legal entity separate and distinct from its stockholders, individually or collectively considered, is not open to debate. It is equally well established that a majority of the stockholders have the right to manage and control the corporation, under certain limitations, and that those who acquire stock are deemed to know that fact and to take it subject to that right. *Enterprise, etc. Pub. Co. v. Craig*, 1924, 195 Ind. 302, * * * * *.

"Ownership of corporate stock is recognized as a proper basis of classification under some circumstances. Thus it has been held that the federal government might require consolidated income tax returns of two brothers who owned 94.4 per cent of the stock of one corporation and 99.6 per cent of another. This was upon the theory that the corporations were affiliated within the meaning of a statute which provided that:

> " 'For the purpose of this section two or more domestic corporations shall be deemed to be affiliated * * * (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests.' "

United States v. Whyel, D. C., 1927, 19 F. 2d, 260, 261.

"This was a District Court case, thereafter affirmed on other grounds by the Circuit Court of Appeals. *United States v. Whyel,* 3 cir., 1928, 28 F. (2nd) 30. Certiorari was denied by the Supreme Court. *United States v. Whyel,* 1929, 278 U. S. 664, 49 S. Ct. 178, 73 L. Ed. 570. So, also, statutes imposing license fees according to the number of establishments 'under the same general management, supervision or ownership,' have been sustained. *State Bd. of Tax Commissioners v. Jackson,* 1931, 283 U. S. 527, 531, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464, 75 A. L. R. 1536; *Fox v. Standard Oil Co.,* 1935, 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780. None of the above cases considered the subject of discrimination against a corporation where the imposition of a tax was dependent upon the ownership of a mere controlling interest of its stock. The only case that we have found where the precise question here presented was before a court of last report is *Independent Gasoline Co. v. Bureau of Unemployment Compensation,* Ga. Sup., 1940, 10 S. E. (2nd) 58, 59. The Georgia statute provides:

> " 'Any employing unit, which together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, * * * and which, if treated as a single unit with such other employing units, * * * would be an employer under Paragraph (1) of this subsection.' "

"The case is so nearly like the one we are called upon to decide that we quote liberally from it. In the majority opinion, the court said:

> " 'But it is contended that the legislature was authorized to place this defendant in a classification different from similar corporations and individuals, because of the fact that the owner of a majority of its stock owns a majority of the stock

of another corporation, and that the two corporations are controlled by the same interests. This reasoning ignores the fact that this defendant is utterly powerless to determine who shall own its capital stock, or to fashion the business transactions and conduct of its stockholders. Since these are matters beyond the control of the corporation, they do not constitute a basis justifying the classification; and a classification must be reasonable and have a fair and substantial relation to the object of the legislation. *County of Walton v. County of Morgan*, 120 Ga. 548 48 S. E. 243; *Stewart v. Anderson*, 140 Ga. 31, 78 S. E. 457. *F. S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U. S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989. It is contended, however, that the classification is justified as a means for enforcing the law and preventing its evasion. No doubt exists as to the right of the legislature to enact any legal provision that will prevent evasion and aid in the enforcement of a legal enactment. *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 S. Ct. 44, 57 L. Ed. 184. But this rule should never sustain an act that places a burden upon innocent and helpless minority stockholders solely because of the status of the majority stockholders who might seek to evade his legitimate obligations under the statute. Such provision to the extent of the pro rata share of the tax borne by the minority stockholder enables the majority stockholder to escape his obligations. If it is sought to prevent evasion the fair and reasonable course would be to impose the entire tax burden upon the interest owning or controlling the different units. Since this procedure would provide a complete means of enforcement and of preventing evasion, and since it would keep the burden of tax payment upon the actor whose conduct it is sought to control, the method prescribed under section 19 (g) (4) is unreasonable, unfair, and can not be sustained.' "

"Mr. Justice Grice concurred specially, and the Chief Justice joined in the views expressed by him. These observations are likewise pertinent and, in a large measure, applicable to the case at bar:

> " 'I am agreeing to the opinion, but there is an additional reason why it seems to me the judgment is correct, and that is that the statute referred to did not contemplate a situation such as is shown by this record. Here we have not only two distinct corporations, but one of them is in one county, one in another. One's line of business is entirely different from the other's. The work required of an employee of the one is not of the same character as that of the other. The two are not one business. It is not a case where the same employees work sometimes for one company, and at other times for the other company. It is not an instance where two or more corporations are engaged in doing things which in their nature are related, nor where for convenience different elements of the same business are operated under different charters; nor is this a case of subterfuge. The two businesses are wholly unrelated. It was not intended that the law should be applied to a state of facts such as that here shown.' "

"As has already been observed, the law regards a corporation as a distinct entity. This status is unaffected by the fact that a majority of its stock may or may not be controlled by the same interests. It may also be assumed for the present inquiry, that excise taxes of the character defined by the Unemployment Compensation Law may be imposed upon corporations; that corporations may be classified for that purpose; and that the amount of such taxes to be exacted may be determined by pay-roll expenditures. It is likewise true that as artificial persons, corporations must enjoy liberty of action to determine for themselves whether they will engage or

continue in enterprises that would render them subject to this tax, and they should be in a position to know or ascertain whether such liability exists. Over the sale and transfer of its stock, a corporation ordinarily has no control. Transactions relating to the sale of capital issues may be negotiated privately or through independent marketing agencies, and the responsible offers of a corporation may not be advised as to the ownership of its shares until the certificates therefor are presented for transfer. The stock of a particular corporation may be so distributed that the controlling majority thereof may change ownership at frequent intervals. In practical operation, situations may arise where the majority of the voting stock may or may not be in the hands of the same interests many times between annual meetings of the stockholders, or even between the tax paying periods. Under such circumstances, uncertainty and confusion would be inevitable and a continuity of policy impossible. For these reasons, it seems impossible to justify the interpretation sought by the state, upon the theory that the holders of a majority of the stock control thereof because it is within their power to dictate who the directors shall be.

> "The feature of the law which apparently undertakes to impose liability for these taxes on a corporation employing less than eight persons because the owner of a majority of its stock has a like interest in another corporation similarly situated, is likewise indefensible. As was pointed out in the concurring opinion of the Georgia case, from which we have quoted, this construction would permit corporations remotely located and engaged in businesses as dissimilar as those for which corporations may be formed, to be arbitrarily and fictitiously considered together for the purpose of imposing this tax. We do not believe

that the General Assembly intended the provision of the act to be so applied, and if it did, we would be obliged to hold it void. Legislatures have a wide latitude in setting up classifications in taxing statutes, but such classifications must always be reasonable and bear a rational relationship to the subject-matters with which they deal. *Board, etc. v. Johnson,* 1909, 173 Ind. 76, 89 N. E. 590.

"It should be kept in mind that the term 'employing unit' as used in the statute, is broad enough to include individuals and copartnerships as well as corporations. In some instances, it may also embrace trustees, personal representatives of estates, and receivers. For an example as to how the act may operate under the state's theory, a corporation with only three employees may be rendered liable for the tax because 51 per cent of its voting stock is owned by a person who also owns a private business with six employees, or two such businesses with three employees each. Thus the corporation, in the case of the illustration, is forced into the situation of a taxpayer, without regard to its competitive relationship to other corporations engaged in the same business and having the same number of employees. Its legal entity, which the law is supposed to respect, is thereby grieviously discriminated against.

The clause, 'controlled directly or indirectly by the same interests' must therefore be carefully scrutinized and considered to ascertain its true meaning and significance. There is authority for the proposition that the holders of a majority of the voting stock of a corporation have control thereof; but to control may also have a restricted meaning, depending upon the circumstances under which the language is employed. Thus, in *City of Chicago v. Dorband,* 1938, 297 Ill. App. 617, 18 N. E. (2nd) 107, the word 'control' as used in an ordinance, was construed as being synonymous

with 'ownership.' Regardless of the shades of meaning that may be attributed to the word, we are convinced that in the interpretation of the act before us, control of a corporation must be regarded as something more than that remote control that arises out of the fact that a majority of the holders of its voting stock may dictate who its directors shall be."

"Since no issue of fraud, deceit, or tax evasion was tendered in this case, we are of the opinion that the construction and application of the statute sought by the state would do violence to the appellant's constitutional rights. We therefore hold that appellant's demurrer to appellee's second paragraph of amended answer ought to have been sustained. Reversed, * * *."

On the record as made, the interpretation of the section of the Act under discussion (Section 41, subdivision 3) sought by the State is unjustifiable. Such construction as to corporations situated and managed as appellants allows corporations to be arbitrarily and fictitiously considered together for the purpose of imposing the tax. The construction and application of the statute so asserted by the State violates appellants' constitutional rights. This Court does not believe that the Legislature intended this provision of the Act to be so construed or applied to a set of facts as established by this record. If it did, the section must be held void as a violation of appellants' constitutional guaranties.

In view of the finding of the Appeal Board and, in the light of the authorities cited, appellants, on this record, are not subject employers within the meaning of the Act, and *Subdivision 3 of Section 41* of the Act as construed and as applied to the facts in the instant case is unconstitutional, in that, it violates appellants' con-

stitutional rights under the Fourteenth Amendment of the Federal Constitution, and Section 16 of the Michigan Constitution, 1908, because it deprives them of their constitutional right to due process and equal protection of the law.

For the reasons stated the finding of the Board is reversed and judgment may be entered in accordance with the foregoing conclusions.

George B. Murphy,
Circuit Judge.

OPINION OF SUPREME COURT

Before the Entire Bench.
Boyles, C. J.

In 1939 one Ruby B. Evick filed with the Unemployment Compensation Commission a claim for unemployment benefits, alleging that George Levey personally, Northwest Apartments, Inc., and 9225 Broadstreet Corporation were her employers within the meaning of Act No. 1, Pub. Acts 1936 (Ex. Sess.), as then amended. The referee held that the above-named corporations were her employers and liable for benefits. On appeal, the referee's decision was affirmed by the appeal board. The Circuit Court for Wayne County granted certiorari to review the decision of the Appeal Board and held (1) that Levey and the three corporations were not subject employers within the meaning of the act, and that therefore the findings of the Appeal Board were contrary to the great weight of the evidence; (2) that section 41 (3) of the act as applied to the situation involved was un-

constitutional. Judgment was entered in favor of the defendants (appellees herein), and the Unemployment Compensation Commission appeals.

The practice to be followed by this court in our consideration of the questions involved has been settled in the recent case of *Godsol v. Unemployment Compensation Commission,* 302 Mich. 652, as follows:

> "It is to be noted that review of decisions of the Appeal Board by the Circuit Court and appeal to this court is provided in Section 38 of the act as amended in 1939 which reads as follows:
>
> " 'Review of questions of fact and law by court. The findings of fact made by the appeal board acting within its powers, if supported by the great weight of the evidence, shall, in the absence of fraud, be conclusive, but the Circuit Court of the county in which the claimant resides or the Circuit court for the county of Ingham shall have power to review questions of fact and law on the record made before the Appeal Board involved in any such final decision or determination but said court may reverse such decision of said appeal board upon a question of fact only if it finds that said decision of the Appeal Board is contrary to the great weight of the evidence: * * *'
>
> "In this case we are limited to a review of the judgment of the Circuit Court. There is no procedure by which we may review directly any decision of the administrative tribunal. The principal question involved here is whether plaintiffs are 'employers' within the terms of the statute."

The instant case is submitted to us on an agreed statement of facts as follows:

> "On September 5, 1939, Ruby Evick, hereinafter called the claimant, filed a claim with the Michi-

gan Unemployment Compensation Commission for unemployment benefits. This claim was denied on November 14, 1939, for lack of evidence in the Michigan Unemployment Compensation Commission of claimant having earned the necessary qualifying 'wages.' The claimant filed an appeal to the referee. At the hearing before the referee, the following undisputed facts were established. The claimant was employed by the Northwest Apartments, Inc., from August 15, 1938, to September 15, 1938; by the Wayne Apartments, Inc., from September 15, 1938, to October 17, 1938, by the 9225 Broadstreet Corporation from October 17, 1938 to March 1, 1939.

"George Levey actively manages the Wayne Apartments, Inc., the 9225 Broadstreet Corporation, the Laredo Apartments, Inc., the York Apartments, Inc., the Northwest Apartments, Inc. During the calendar years 1938 and 1939, the above-named corporations, if treated as a single unit for the purpose of counting the number of individuals in employment, had in employment eight or more individuals in each of twenty weeks within each of the said calendar years. Each corporation taken individually had less than eight individuals in employment at all times. The corporations by whom claimant was employed together did not employ eight individuals.

"Each of the above named corporations was incorporated under the provisions of the Michigan general corporations act and in accordance with the exempt transaction law, so-called, which law limits the number of incorporators to twenty-five (25) and requires each incorporator to sign the articles of incorporation. Each corporation owns and operates one apartment house, except the Northwest Apartments, Inc., which has three apartment buildings located at 1910 Tuxedo avenue, 1416 Lee place, and 1818 Savannah avenue.

"The board of directors of each of the said corporations is the same, being composed of George Levey, president, Mrs. George Levey, and Joseph G. Aller, secretary and treasurer. George Levey actively manages the business of each corporation.

"The corporate structure of the said corporations is as follows:

"Corporation	"A" Stock	"B" Stock	Date
"Wayne Apartments, Inc.	$35,000	$1,000	Oct. 14, 1936
"9225 Broadstreet Corp.	30,000	500	Jan. 5, 1937
"Laredo Apartments, Inc.	35,000	500	March 30, 1937
"York Apartments, Inc.	37,000	500	Sept. 24, 1937
"Northwest Apts., Inc.	42,000	500	April 26, 1938

"In each corporation the stockholders are divided into two classes, 'A' stock and 'B' stock. The 'A' stock is common stock in each instance and carries no voting rights. The 'B' stock is the voting stock in each corporation. All of the 'B' stock in each corporation is owned by George Levey. The common stockholders in each corporation are different individuals.

"In 1936, George Levey, together with a group of individuals, purchased an apartment building and incorporated under the name of Wayne Apartments, Inc. All of the people who were interested in purchasing this apartment dwelling signed the articles of incorporation.

"In January, 1937, George Levey and a different group of individuals purchased another building located at 9225 Broadstreet, Detroit, and formed a corporation known as 9225 Broadstreet Corporation. Subsequently, George Levey and different groups of individuals purchased apartment buildings and incorporated in like manner.

"These corporations were not formed as separate enterprises for the purpose of evading the Michigan unemployment compensation act. The

> profits, if any, arising from the corporate business are divived among the stockholders in the form of dividends."

The five corporations involved have boards of directors consisting of the same persons, namely: George Levey; his wife, Mrs. George Levey; and Joseph G. Aller. George Levey actively manages the business of all five corporations. He owns all of the voting stock of all five corporations, is the president of each corporation. He receives his management fees proportionately from all five corporations. These corporations all have the same common purpose, owning and operating apartment buildings. The circuit judge held that these corporations did not constitute an employer within the meaning of Section 41 (3) of Act No. 347, Pub. Acts 1937, which at the time this controversy arose read as follows:

> "Employer means: * * *
>
> "(3) Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise) and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (one) of this section."

The circuit judge was in error in holding that the decision of the appeal board was against the great weight of the evidence. On the facts adduced, the appeal board rightly held that the appellee corporations constituted an employer within the meaning of Section 41 (3) of the act. *Godsol v. Unemployment Compensation Commission, supra; Iron Street Corporation v. Unemployment Compensation Commission* (this day decided), ...Mich. .....

The lower court also held that section 41 (3) of the unemployment compensation act in effect at the time this controversy arose (Act No. 1, Pub. Acts 1936 [Ex. Sess.], as amended by Act. No. 347, Pub. Acts 1937, and Act No. 324, Pub. Acts 1939, Stat. Ann. 1940 Cum. Supp. § 17.501 *et seq.*, before amendment by Act No. 364, Pub. Acts 1941) was in conflict with the due process and equal protection clauses of the 14th Amendment to the United States Constitution, and section 16 of article 2 of the Michigan Constitution (1908). This question has now been decided contrary to the holding of the lower court in *Godsol v. Unemployment Compensation Commission, supra,* and *Iron Street Corporation v. Unemployment Compensation Commission,* this day decided.

The judgment of the trial court is set aside and the cause remanded for the entry of a judgment sustaining the decision of the appeal board, but without costs, a public question being involved.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1.

THE OPINIONS OF THE COURTS BELOW

The Circuit Court for the County of Wayne found Section 41, Sub. 3 of Act 347 Public Acts of 1937 of Michigan (the affiliate clause of the Mich. Unemployment Compensation Act), repugnant to the Fourteenth Amendment of the Federal Constitution as depriving petitioners of due process and equal protection of the law. The Supreme Court reversed that judgment.

2.

STATEMENT AS TO JURISDICTION

This is fully set forth in the attached petition, page 2.

3.

STATEMENT OF THE CASE

This is set forth in the attached petition, page 3.

4.

QUESTION PRESENTED

This is set forth in the attached petition, page 2, namely; the constitutionality of Section 41, sub-section 3 of Act 347 of the Public Acts of 1937 of Michigan, the so-called affiliate clause of the Unemployment Compensation Act.

5.

ARGUMENT

The best reasoned case having to do with the constitutionality of the Affiliation Clause as applied to corporations, is the case which came down from the Supreme Court of Georgia, *Independent Gasoline Company v. Bureau of Unemployment Compensation*, 190 Georgia 613 (certiorari denied 61 S. Ct. 175) where an Affiliation Clause substantially the same as that in Michigan was attacked on the ground that it was unconstitutional, and the Court points out (page 614) that in Georgia, a corporation

> "Is an artificial person * * *. This legal entity retains its separate and independent character regardless of the ownership of its capital stock, and as such it cannot be held liable for the obligations of a stockholder, nor are the stockholders liable for the obligations of the corporation." Citing cases.

The Court recognized that there were cases where (page 615)

> "Stock ownership has been resorted to for the purpose of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company."

The Court then said:

> "Courts will not permit themselves to be blinded and deceived by the mere form of law, but will, regardless of fiction, deal with the substance, as if the corporation did not exist and as justice may require." Citing cases.

Having recognized that there are instances where it is constitutional and proper to look through a corporate fiction, the Court proceeds to analyze the argument that it is constitutional here to look through the corporate fiction, in the following language, page 615

> "We do not consider any of the decisions above cited as authority for an arbitrary disregard of the legal status and substantial rights of a corporation which has done no wrong and is seeking to evade no law. The constitutional provisions here invoked by the defendant do not appear to be limited as to parties or circumstances, but are universal and impartial. The exact language of that portion of the United States constitution which the defendant invokes (Code, Sec. 1-815) is as follows: 'No State shall * * * deny to any person

within its jurisdiction the equal protection of the laws.' The provision of the State constitution invoked (Sec. 2-102) declares that 'Protection to person and property is the paramount duty of government and shall be impartial and complete.' We now place the provision of the act as applied to the defendant by the side of these constitutional provisions, to determine whether there is a violation. This defendant does not employ the minimum of eight required by the act to render it subject. No competitor of defendant, whether an individual or corporation, having only five employees, as does this defendant, is subject to the provisions of the act or required to pay any tax thereunder. Therefore, if this defendant is required by section 19 (g) (4) to pay the tax, it is thereby definitely carrying a tax burden from which all others, both individuals and corporations, similarly situated are exempt. There is no room for doubt that in such circumstances this defendant is denied the equal protection guaranteed by the Federal constitution and the impartial and complete protection of property guaranteed by the State constitution.

But it is contended that the legislature was authorized to place this defendant in a classification different from similar corporations and individuals, because of the fact that the owner of a majority of its stock owns a majority of the stock of another corporation, and that the two corporations are controlled by the same interests. This reasoning ignores the fact that this defendant is utterly powerless to determine who shall own its capital stock, or to fashion the business transactions and conduct of its stockholders. Since these are matters beyond the control of the corporation, they do not constitute a basis justifying the classification; and a classification must be reasonable and have a fair and substantial relation to the object of the legislation. *County of Walton v. County of Morgan*, 120 Ga. 548 (48 S. E. 243); *Stewart v. Anderson*,

140 Ga. 31 (78 S. E. 457); *F. S. Royster Guano Co. v. Virginia,* 253 U. S. 412, 415 (40 Sup. Ct. 560, 64 L. Ed. 989). It is contended, however, that the classification is justified as a means for enforcing the law and preventing its evasion. No doubt exists as to the right of the legislature to enact any legal provision that will prevent evasion and aid in the enforcement of a legal enactment. *Purity Extract & Tonic Co. v. Lynch,* 226 U. S. 192 (33 Sup. Ct. 44, 57 L. Ed. 184). But this rule should never sustain an act that places a burden upon innocent and helpless minority stockholders solely because of the status of the majority stockholder who might seek to evade his legitimate obligations under the statute. Such provision to the extent of the pro-rata share of the tax borne by the minority stockholder enables the majority stockholder to escape his obligations. If it is sought to prevent evasion the fair and reasonable course would be to impose the entire tax burden upon the interest owning or controlling the different units. Since this procedure would provide a complete means of enforcement and of preventing evasion, and since it would keep the burden of tax payment upon the actor whose conduct it is sought to control, the method prescribed under section 19 (g) (4) is unreasonable, unfair, and cannot be sustained.

In *Unemployment Compensation Commission v. City Ice & Coal Co.,* 216 N. C. 6 (3 S. E. 2d, 290), the Supreme Court of North Carolina held Section 19 (f) (4) of the North Carolina act, which is substantially the same as section 19 (g) (4) of the Georgia act, to subject the three corporations there involved to the payment of the tax required by the act. While the facts in that case are similar to those in the present case, yet it does not appear that the court passed on the validity of the law. The opinion merely interpreted the provisions of the act to embrace the defendants involved, and it does not constitute an adjudication that the act is

valid as against the grounds of attack made in the present case. It is also well to note the concluding sentence of the opinion, as follows: 'It tends to aid a more effective administration of the act, in that the number of smaller units from which contributions are to be made will be reduced, while the benefits to be derived from the unemployment insurance will be extended to a larger number of individuals.' We think the quoted language shows a misconstruction of the act, because it clearly does not reduce the number of units from which contributions are to be made, but requires contribution from each employing unit rendered subject. Another case where a provision similar to the Georgia act was involved is *Gibson Products Co. v. Murphy,* Okla. (100 Pac. 2d 453). The Supreme Court of Oklahoma held a provision of the Oklahoma act, which is substantially the same as section 19 (g) (4) of the Georgia act, valid as against an attack upon the ground that it violates the contract clause of the State constitution. None of the grounds of attack in the present case were presented or passed upon by that court; and hence the opinion is not authority on the question before us.

This record presents no reason for denying to the plaintiff in error the equal protection guaranteed by the State and United States constitutions. The portion of section 19 (g) (4) upon which the present action is brought, and which declares that an 'employer' under the act shall include 'any employing unit, which together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, * * * and which, if treated as a single unit with such other employing units, * * * would be an employer under paragraph 1 of this subsection,' contravenes the constitutional provisions invoked. It is therefore void, and the

demurrer raising this question should have been sustained."

In *Benner-Coryell Lumber Co., Inc., v. Indiana Unemployment Compensation Board,* 29 Northeastern 2d 776 (1940) (Certiorari denied by the Supreme Court of the United States, 312 U. S. 698), a similar question arose. The Indiana Court in rejecting the philosophy that this statute undertakes to impose liability for taxes upon a unit employing less than eight persons because the owner of a majority of its stock was an owner of more than 50% interest in a similar subject corporation said:

> "The appellant contends that the section of the Unemployment Compensation Law quoted above is unconstitutional when applied to the facts admitted by the pleadings. It asserts that the corporations concerned are separate and distinct legal entities, and that their classification for taxing purposes on the basis of the combined number of their employees violates Section 1 of Article 10 of the Constitution of Indiana, which provides for a uniform and equal rate of assessment and taxation, and the provision of the Fourteenth Amendment to the federal constitution which guarantees to citizens (including corporations) equal protection of the laws. It is to be noted that no elements of fraud or intentional tax evasion are involved in this case, nor is there any showing of joint management of the two corporations or any other relationship between them beyond the fact that Bertha J. Coryell owns a controlling interest in the common stock of each. It is urged that to hold the statute valid as it is sought to be applied here, would unjustly penalize minority stockholders of corporations, who have no control over the transfer of stock not held by them, and are therefore powerless to prevent a majority of such stock from gravitating into the hands of one person who may at the same time own, or thereafter acquire, a controlling interest in another corporation, thereby subjecting,

indirectly, said minority holders to the burden of taxes not imposed upon corporations otherwise situated.

(1-2) The taxes imposed by the Indiana Unemployment Compensation Law are excise and not property taxes. *Carmichael v. Southern Coal & Coke Co.*, 1937, 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1327; *Charles C. Steward Mach. Co. v. Davis*, 1937, 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293. Section 1 of article 10 of the Constitution of Indiana, which provides for a uniform and equal rate of assessment and taxation and forbids exempting property except for specific purposes, applies only to property taxes under a general levy. *Miles v. Dept. of Treasury*, 1935, 209 Ind. 172, 199 N. E. 372, 101 A. L. R. 1359.

(3-5) The question which we are called upon to answer is therefore reduced to this: Do the owners of a majority of the stock of a corporation have such control thereof as to make their ownership or control the basis of classification for the purpose of imposing excise taxes on such corporations in the manner prescribed by the act under consideration? That a corporation is a legal entity separate and distinct from its stockholders, individually or collectively considered, is not open to debate. It is equally well established that a majority of the stockholders have the right to manage and control the corporation, under certain limitations, and that those who acquire such stock are deemed to know that fact and to take it subject to that right. *Enterprise, etc., Publishing Co. v. Craig*, 1924, 195 Ind. 302, 144 N. E. 542, 145 N. E. 309; *Barnes v. Brown*, 1880, 80 N. Y. 527; *First Nat. Bank v. Fireproof S. B. Co.*, 1925, 199 Iowa 1285, 202 N. W. 14.

Ownership of corporate stock is recognized as a proper basis of classification under some circum-

stances. Thus it has been held that the federal government might require consolidated income tax returns of two brothers who owned 94.4 per cent of the stock of one corporation and 99.6 per cent of another. This was upon the theory that the corporations were affiliated within the meaning of a statute which provided that; 'For the purpose of this section two or more domestic corporations shall be deemed to be affiliated * * * (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests.' *United States v. Whyel, D. C.*, 1927, 19 F. 2d 260, 261. This was a District Court case, thereafter affirmed on other grounds by the Circuit Court of Appeals. *United States v. Whyel,* 3 Cir., 1928, 28 F. 2d 30. Certiorari was denied by the Supreme Court. *United States v. Whyel,* 1929, 278 U. S. 664, 49 S. Ct. 178, 73 L. Ed. 570. So, also, statutes imposing license fees according to the number of establishments 'under the same general management, supervision or ownership,' have been sustained. *State Board of Tax Commissioners v. Jackson,* 1931, 283 U. S. 527, 531, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464, 75 A. L. R. 1536; *Fox v. Standard Oil Co.,* 1935, 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780 None of the above cases considered the subject of discrimination against a corporation where the imposition of a tax was dependent upon the ownership of a mere controlling interest of its stock. The only case that we have found where the precise question here presented was before a court of last resort is *Independent Gasoline Co. v. Bureau of U. Compensation,* Ga. Sup., 1940, 10 S. E. 2d 58, 59. The Georgia statute provides: 'Any employing unit, which together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, * * * and which, if treated as a single unit with such other employing units, * * * would be an employer under paragraph (i) of this subsection.'

The case is so nearly like the one we are called upon to decide, that we quote liberally from it. In the majority opinion, the court said: 'But it is contended that the legislature was authorized to place this defendant in a classification different from similar corporations and individuals, because of the fact that the owner of a majority of its stock owns a majority of the stock of another corporation, and that the two corporations are controlled by the same interests. This reasoning ignores the fact that this defendant is utterly powerless to determine who shall own its capital stock, or to fashion the business transactions and conduct of its stockholders. Since these are matters beyond the control of the corporation, they do not constitute a basis justifying the classification; and a classification must be reasonable and have a fair and substantial relation to the object of the legislation. *County of Walton v. County of Morgan,* 120 Ga. 548, 48 S. E. 243; *Stewart v. Anderson,* 140 Ga. 31, 78 S. E. 457; *F. S. Royster Guano Co. v. Commonwealth of Virginia,* 253 U. S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989. It is contended, however, that the classification is justified as a means for enforcing the law and preventing its evasion. No doubt exists as to the right of the legislature to enact any legal provision that will prevent evasion and aid in the enforcement of a legal enactment. *Purity Extract & Tonic Co. v. Lynch,* 226 U. S. 192, 33 S. Ct. 44, 57 L. Ed. 184. But this rule should never sustain an act that places a burden upon innocent and helpless minority stockholders solely because of the status of the majority stockholder who might seek to evade his legitimate obligations under the statute. Such provision to the extent of the pro rata share of the tax borne by the minority stockholder enables the majority stockholder to escape his obligations. If it is sought to prevent evasion the fair and reasonable course would be to impose the entire tax burden upon the interest owning or controlling the different units. Since this procedure would provide a complete

means of enforcement and of preventing evasion, and since it would keep the burden of tax payment upon the actor whose conduct it is sought to control, the method prescribed under section 19 (g) (4) is unreasonable, unfair, and cannot be sustained.' Mr. Justice Grice concurred specially, and the Chief Justice joined in the views expressed by him. These observations are likewise pertinent, and, in a large measure, applicable to the case at bar: 'I am agreeing to the opinion, but there is an additional reason why it seems to me the judgment is correct, and that is that the statute referred to did not contemplate a situation such as is shown by this record. Here we have not only two distinct corporations, but one of them is in one county, one in another. One's line of business is entirely different from the other's. The work required of an employe of the one is not of the same character as that of the other. The two are not one business. It is not a case where the same employes work sometimes for one company, and at other times for the other company. It is not an instance where two or more corporations are engaged in doing things which in their nature are related, nor where for convenience different elements of the same business are operated under different charters; nor is this a case of subterfuge. The two businesses are wholly unrelated. It was not intended that the law should be applied to a state of facts such as that here shown.'

(6, 7) As has already been observed, the law regards a corporation as a distinct entity. This status is unaffected by the fact that a majority of its stock may or may not be controlled by the same interests. It may also be assumed for the present inquiry, that excise taxes of the character defined by the Unemployment Compensation Law may be imposed upon corporations; that corporations may be classified for that purpose; and that the amount of such taxes to be exacted may be determined by payroll expenditures. It is likewise true that as ar-

tificial persons, corporations must enjoy liberty of action to determine for themselves whether they will engage or continue in enterprises that would render them subject to this tax, and they should be in a position to know or ascertain whether such liability exists. Over the sale and transfer of its stock, a corporation ordinarily has no control. Transactions relating to the sale of capital issues may be negotiated privately or through independent marketing agencies, and the responsible officers of a corporation may not be advised as to the ownership of its shares until the certificates therefor are presented for transfer. The stock of a particular corporation may be so distributed that the controlling majority thereof may change ownership at frequent intervals. In practical operation, situations may arise where the majority of the voting stock may or may not be in the hands of the same interests many times between annual meetings of the stockholders, or even between the tax paying periods. Under such circumstances, uncertainty and confusion would be inevitable and a continuity of policy impossible. For these reasons, it seems impossible to justify the interpretation sought by the state, upon the theory that the holders of a majority of the stock have control thereof because it is within their power to dictate who the directors shall be.

(8, 9) The feature of the law which apparently undertakes to impose liability for these taxes on a corporation employing less than eight persons because the owner of a majority of its stock has a like interest in another corporation similarly situated, is likewise indefensible. As was pointed out in the concurring opinion of the Georgia case, from which we have quoted, this construction would permit corporations remotely located and engaged in businesses as dissimilar as those for which corporations may be formed, to be arbitrarily and fictitiously considered together for the purpose of imposing this tax. We do not believe that the General As-

sembly intended the provision of the act to be so applied, and if it did, we would be obliged to hold it void. Legislatures have a wide latitude in setting up classifications in taxing statutes, but such classifications must always be reasonable and bear a rational relationship to the subject-matters with which they deal. *Board, etc., v. Johnson,* 1909, 173 Ind. 76, 89 N. E. 590.

(10, 11) It should be kept in mind that the term 'employing unit,' as used in the statute, is broad enough to include individuals and co-partnerships, as well as corporations. In some instances, it may also embrace trustees, personal representatives of estates, and receivers. For an example as to how the act may operate under the State's theory, a corporation with only three employes may be rendered liable for the tax because 51 per cent of its voting stock is owned by a person who also owns a private business with six employes, or two such businesses with three employes each. Thus the corporation, in the case of the illustration, is forced into the situation of a taxpayer, without regard to its competitive relationship to other corporations engaged in the same business and having the same number of employes. Its legal entity, which the law is supposed to respect, is thereby grievously discriminated against. The clause, 'controlled directly or indirectly by the same interests,' must therefore be carefully scrutinized and considered to ascertain its true meaning and significance. There is authority for the proposition that the holders of a majority of the voting stock of a corporation have control thereof; but to control may also have a restricted meaning, depending upon the circumstances under which the language is employed. Thus, in *City of Chicago v. Dorband,* 1938, 297 Ill. App. 617, 18 N. E. 2d 107, the word 'control,' as used in an ordinance, was construed as being synonymous with 'ownership.' Regardless of the shades of meaning that may be attributed to the word, we are convinced that in the interpretation of the act before us,

control of a corporation must be regarded as something more than that remote control that arises out of the fact that a majority of the holders of its voting stock dictate who its directors shall be.

Since no issue of fraud, deceit, or tax evasion was tendered in this case, we are of the opinion that the construction and application of the statute sought by the state would do violence to the appellant's constitutional rights. We therefore hold that appellant's demurrer to appellee's second paragraph of amended answer ought to have been sustained.

Reversed, with directions so to do."

The Supreme Court of Michigan, in sustaining the constitutionality of the affiliate clause in question, supported its decision on *Iron Street Corporation vs. Michigan Unemployment Compensation Commission*, decided by the Supreme Court of Michigan on June 7th, 1943, and in that case the Michigan Supreme Court seeks support for its decision in *Carmichael vs. Southern Coal and Coke Co.*, 301 U. S. 495. We urge that the question now before this court was not before the court in the *Carmichael* case, *supra*. If before this court, at all, the Supreme Court of the United States in *Retirement Board vs. Alton R. R. Company*, 295 U. S. 330, in answering the contention of respondent on page 342 that:

"The Act is unconstitutional in that it unlawfully undertakes to mingle and pool the resources and obligations of the carriers among themselves and with others. The Act treats all carriers together as one employer and all employees of all carriers as the employees of one employer * * *"

said:

"There is no warrant for taking the property or money of one and transferring it to another with-

> out compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees".

and further:

> "We conclude that the provisions of the Act, which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligation and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process."

The *Alton R. R. Co.* case, *supra,* to us, appears sufficient answer to *State of Washington vs. Kitsap County Bank,* 10 Wash. (2d) 520, relied upon by the Supreme Court of Michigan.

We urge that the burdening of the individual corporations, at bar, with a tax for which each individually is not liable, by the expedient of pooling them and treating them as a single employer, is repugnant to the due process amendment of the Federal Constitution.

6.

RELIEF PRAYED

Petitioners pray the issuance of a Writ of Certiorari to review the determination of this cause by the Supreme Court of Michigan, and that this Court review and reverse the decision of the Supreme Court of Michigan.

Respectfully submitted,

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JOSEPH G. ALLER,
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Attorneys for Petitioners.

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United States of America

In the Supreme Court of the United States

October Term, 1943

No. 465

WAYNE APARTMENTS, Inc.,
LAREDO APARTMENTS, Inc.,
YORK APARTMENTS, Inc.,
9225 BROADSTREET CORPORATION, NORTHWEST APARTMENTS, Inc.,
Michigan corporations,
Petitioners,

v.

MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION,
Respondent.

Respondent's Brief Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

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United States of America

In the Supreme Court of the United States

October Term, 1943

No. 465

WAYNE APARTMENTS, Inc., et al.,
Michigan corporations,
Petitioners,

v.

MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION,
Respondent.

Respondent's Brief Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

I

Opinions Below.

The opinion of the Supreme Court of the State of Michigan, review of which is sought on *certiorari*, is officially reported as:

Wayne Apartments, Inc., v. Unemployment Compensation Commission, 305 Mich. 714.

That opinion, however, is based upon a decision rendered on the same day (June 7, 1943), which is officially reported as:

> Iron Street Corporation v. Unemployment Compensation Commission, 305 Mich. 643.

And the opinion in Iron Street Corporation v. Unemployment Compensation Commission, *supra,* follows a former decision officially reported as:

> Godsol v. Unemployment Compensation Commission, 302 Mich. 652 (also reported in 142 ALR 910).

II

Summary Statement of Matters Involved.

We accept petitioners' summary statement of the matters involved.

III

Basis of Jurisdiction.

While counsel fail to cite the provisions of the Judicial Code, or the rule of this Court, on which they rely to sustain jurisdiction, they probably have in mind § 237, Judicial Code (Title 28 U.S.C. § 344 [b]), and Court Rule 38.

Our position is that the state court has not decided a federal question of substance not heretofore determined

in principle by this Court *(Carmichael v. Southern Coal Co.,* 301 U. S. 495), nor has it decided such a question in a way probably not in accord with applicable decisions of this court.

IV

Question Presented.

The question for decision is whether there is substance in the claim that the 'affiliate clause' of section 41 of the Michigan Unemployment Compensation Act, as construed and applied to them by the court below, denies petitioners due process or equal protection of the laws (Fourteenth Amendment, Federal Constitution;—Act No. 1, § 41 [3], Pub. Acts Mich. 1936, Extra Session, as amended by Act No. 347, Pub. Acts Mich. 1937).

V

Summary of Statute Involved.

The act in question, passed by the legislature in exercise of their taxing authority and in exertion of state police powers, declares public policy in respect of involuntary unemployment (§ 2), and creates a commission to administer the law (§ 3).

> "Briefly stated, that act provides for a segregated fund created, in large part, by assessment upon employers of workmen and to be administered by a state commission with mapped procedure",

Chrysler Corporation v. Smith, 297 Mich. 438, 442.

Paraphrasing the language of this Court in considering a similar enactment by the Alabama legislature (*Carmichael v. Southern Coal Co.*, 301 U.S. 495, 505, 506), it may be said that the Michigan Unemployment Compensation Act sets up a comprehensive scheme for providing unemployment benefits for workers employed within the state by employers designated by the act,—§ 13 (as amended by Act 347, 1937), § 40 (unamended), and § 41 (as amended by Act 347, 1937) comprising the substantive law of the subject-matter of this litigation.

The Act imposes upon the employers the obligation to pay a certain percentage of their total monthly payrolls into the state unemployment compensation fund (§ 13, as amended), which is kept 'separate and apart from all public moneys or funds of the state' and is administered in trust 'exclusively for the purposes of' the act (§ 26, as amended by Act 324, 1939).

Benefits are payable therefrom to the employees covered by the act, in the event of their unemployment, upon prescribed conditions and at prescribed rates (§ § 27, 28, 29). **[1]**

---

[1]

Section 11 of the act provides full cooperation with the Federal Social Security Board, and the statute in general satisfies the criteria which, by § 903 (a) of the Social Security Act of August 14, 1935, c. 531, 49 Stat. 620, 640, 42 U.S.C. § 1103 (a), are made prerequisite to its approval by the Social Security Board created by that act, and it has been approved by the Board as that section directs. By § 902 of the Social Security Act, contributors to the state fund are entitled to credit their contributions in satisfaction of the tax imposed on employers by the Social Security Act, to the extent of 90% of the tax. Carmichael v. Coal Co., supra.

The term 'employing unit', used by the legislature in defining an 'employer' obligated to contribute to the fund, means (§ 40) 'any individual or type of organization', inclding corporations.

And 'employer' (§ 41 as amended) means:

"(1) Any employing unit which in each of twenty [20] different weeks within the current calendar year or within the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight (8) or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), including any employing unit (for which service deemed employment as defined by this act is or was performed during such current or preceding calendar year) subject (during such current or preceding calendar year) to the pay roll tax levied by title nine (9) of the social security act;

(2) Any individual legal entity or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this act;

(3) Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise) and which, if treated as a single unit with such other

employing units or interests, or both, would be an employer under paragraph (one) of this section;

(4) Any employing unit which having become an employer under paragraph [one], [two], [three] or [four] hereof, has not, under sections twenty-three [23] and twenty-five [25] of this act, ceased to be an employer subject to this act; or

(5) For the effective period of its election pursuant to section twenty-five [25] any other employing unit which has elected to become fully subject to this act.''

VI

Reasons for Opposing the Allowance.

The reasons relied on for allowance of the writ, possess no merit:

1. It is said that the court below has decided a federal question (the constitutionality of the affiliate clause of the Michigan Unemployment Compensation Act), in a way conflicting with the determination of this Court in denying certiorari in

Independent Gasoline Co. v. Bureau of Unemployment Compensation, 190 Ga. 613, 10 S.E. 2d 58 (certiorari denied, 311 U.S. 707).

One answer is that 'the denial of a writ of certiorari

imports no expression of opinion upon the merits of the case, as the bar has been told many times',

United States v. Carver, 260 U.S. 482, 490,

Atlantic Coast Line R. Co. v. Power, 283 U.S. 401, 403.

Furthermore, the facts involved in the Georgia case bear little resemblance to those presented here.

2. Petitioners urge that the state court decided the question in a way probably not in accord with an applicable decision of this Court,

Retirement Board v. Alton Railroad Co., 295 U.S. 330,

but, we respectfully submit, the 'affiliate clause' of the Michigan act sustained in the court below, does not come within range of this Court's sweeping denunciation of the railroad retirement act; and a subsequent decision upholding the constitutional validity of a similar measure of social significance (the Alabama Unemployment Compensation Act), as against objections closely resembling those urged at bar, announces the controlling principle,

Carmichael v. Southern Coal Co., 301 U.S. 495.

It should also be noted that the learned Justice who wrote the dissenting opinion in the *Carmichael* case, *supra,* cited *Retirement Board v. Alton R. Co., supra,* as authority for the view that the Alabama unemployment compensation act was grossly unfair.

3. Petitioners also contend that 'if this Court has not settled the question as to the constitutionality of the affiliate clause, then, an important question of federal law remains, which question has not been, but should be settled by this Court *in view of the conflicting decisions of various state courts'*.

While this Court have indicated as one of the reasons to be considered on an application for *certiorari* to a circuit court of appeals, the fact that such a court 'has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter' (Rule 38 [b]), that rule does not apply to a conflict of decisions in state courts.

We further reply that the question here raised, was set at rest in principle by the decision of this Court in the case of *Carmichael, supra,* and that the decisions of state courts cited in counsel's brief reveal that, while a small minority seem to sustain petitioners' position (though such decisions are distinguishable), the great weight of authority and the decided trend of judicial thought upholds the constitutional validity of such an 'affiliate clause' as is found in § 41 of the Michigan Unemployment Compensation Act.

See Annotation following unofficial report of

Godsol v. Unemployment Compensation Commission, supra, found in 142 ALR 918.

VII

Argument

Point One

There is no substance in the claim that the challenged legislation, as construed and applied below, denies due process of law.

In urging that due process of law has been denied, counsel do not state precisely in what manner the statute affects the peculiar situation in which the petitioners have placed themselves.

The court below, when construing the language of § 41 (3) of the act for the purpose of testing its validity, most carefully applied the statute to the precise facts involved, and restricted consideration of its provisions to the setting supplied by the record, [2] for it appeared, and the court found that:

> "The five corporations involved have boards of directors consisting of the same persons, namely: George Levey, his wife, Mrs. George Levey; and Joseph G. Aller. George Levey actively manages the business of all five corporations, is the president of each corporation. He receives his management fees

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[2]

"These principles have been recognized by the Supreme Court of the United States. That tribunal has announced that it rigidly adheres to the rule never to anticipate a question of constitutional law in advance of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and never to consider the constitutionality of state legislation unless it is imperatively required". 11 Am. Jur., Constitutional Law, § 98, p. 722.

> proportionately from all five corporations. These corporations all have the same common purpose, owning and operating apartment buildings".

And, we might add, it is also worthy of note that Ruby Evick, who in this case sought and obtained unemployment compensation, had been employed, during consecutive periods of time, by three of the corporations involved, *viz,* the Northwest Apartments, Inc., the Wayne Apartments, Inc., and 9225 Broadstreet Corporation (R. 31-32).

Exercise of the same degree of judicial care is manifest in the companion case *(Iron Street Corporation v. Unemployment Compensation Commission,* 305 Mich. 643, 653) where the court observed the importance of noting the nature of the businesses in which the organizations involved in the cases cited were engaged.

> "It thus appears (say the court) that, in the instances where the affiliate clause has been held to apply to a corporation, the businesses of the employing units have been somewhat related to each other. **[3]**

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[3]

Connecticut.—New Haven Metal & Heating Supply Co. v. Danaher (1941) 128 Conn. 213, 21 A. 2d 383.

Maine.—Maine Unemployment Compensation Commission v. Androscoggin Jr., Inc. (1940) 137 Me. 154, 16 A. 2d 252.

Mississippi.—Mississippi Unemployment Compensation Commission v. Avent (1941) —— Miss. ——, 4 So. 2d 684.

Missouri.—Kellogg v. Murphy (1942) —— Mo. ——, 164 SW 2d 285; —Warren Brokerage Co. v. Unemployment Compensation Commission (1943) 13 So. 2d 227.

New Jersey.—Wiley Motors Inc. v. Unemployment Compensation Commission (1943), 130 N.J. Law 30, 31 A. 2d 39.

Wash.—State v. Kitsap County Bank (1941) 10 Wash. 2d 520, 117 P. 2d 228.

> We, therefore, hold that where one or more of the employing units is a corporation and the business conducted by either unit is relevant or incidental to the business of the other, the several employing units must be deemed to come within the classification of the affiliate clause, section 41 (3)".

In so holding, the Court approves the following statement found in the opinion of the Missouri Supreme Court, Division 2 *(Kellogg v. Murphy,* 349 Mo. 1165, 1182, 164 S.W. 2d 285):

> "We hold the affiliate clause, subsection (h) 4, should be construed to refer to businesses which by location, nature or common experience might not unreasonably be expected to operate under substantial unification in the absence of such a statute; and to those where there is evidence of actual unifications. . . . But it is our conclusion that the two businesses involved in this case come within that rule—a general printing business and a newspaper publishing business conducted at the same address and under common major ownership. This is true although they were and previously had been operated as separate entities".

It might be observed at this point, that the situation presented in the case at bar (as defined by the court below) is a far cry from that involved in *Railroad Retirement Board v. Alton R. Co.,* 295 U.S. 330.

It may also be noted, in considering the two cases upon which counsel rely, that the supreme courts of Georgia and Indiana do not rest their decisions upon an alleged denial of due process, but condemn the legislative classi-

fication set up by the affiliate clause of the unemployment compensation acts of their respective states,

Independent Gasoline Co. v. Bureau of Unemployment Compensation, 190 Ga. 613, 10 S.E. 2d 58,

Benner-Coryell Lumber Co. v. Indiana Unemployment Compensation Board, 218 Ind. 20, 29 N.E. 2d 776.

There is, therefore, little, if any, authority for the proposition that the provisions of § 41 (3) of the Michigan statute, are, *as presently applied,* so arbitrary, unreasonable or capricious, as to deprive the corporations involved of their property without due process of law.

As the court below said when first called upon to consider the constitutionality of this act *(Godsol v. Unemployment Compensation Commission,* 302 Mich. 652, 663), such a provision as that found in the affiliate clause

> "is not arbitrary nor unreasonable. On the contrary, such provision is necessary in order that the benefits of the act be not denied and the purposes of the act as a whole be not frustrated to many employees by reason of disintegrated ownership and control. A reasonable relationship between the statute and the evil sought to be controlled brings the statute within the limits of constitutionality".

So clearly is our position stated in the opinions of the supreme court of this state, that it scarcely seems necessary to repeat what is there said, or to cite and discuss the many authorities cited.

We respectfully submit that petitioners' claim of denial of due process of law, lacks sufficient substance to justify a review by this Court.

Point Two

Nor is there substance in the contention that the affiliate clause of the act in question, denies petitioners the equal protection of the laws.

Again without attempting to apply general principles to the precise facts disclosed by the record, counsel rely entirely upon the Indiana and Georgia cases, *supra,* with a side glance at the decision of this Court in *Retirement Board v. Alton R. Co.,* 295 U.S. 330.

The argument of the Georgia court (in the case of the *Independent Gasoline Company, supra),* and adopted by petitioners, runs as follows:

> "This defendant does not employ the minimum of eight required by the act to render it subject. No competitor of defendant, whether an individual or corporation, having only five employees, as does this defendant, is subject to the provisions of the act or required to pay any tax thereunder. Therefore, if this defendant is required by . . . . (the affiliate clause) to pay the tax, it is thereby definitely carrying a tax burden from which all others, both individuals and corporations, similarly situated are exempt. There is no room for doubt that in such circumstances this defendant is denied the equal protection guaranteed by the Federal Constitution".

And some reference is made to 'innocent and helpless minority stockholders'.

The Michigan Supreme Court points out, in the companion case of the *Iron Street Corporation, supra* (upon which the decision at bar rests), that the answer to the proposition advanced by the Georgia court is found in the following statement of the Connecticut court in *New Haven Metal & Heating Supply Company v. Danaher,* 128 Conn. 213, 21 A. 2d 383:

> "The formula established by the statutory provision in question applies to all employers similarly situated, that is, to all employers whose businesses are under common ownership or control, the question is resolved to whether the classification has a fair and substantial relation to the object of the legislation. If it has, it is valid. If it has not, it is arbitrary, unreasonable and capricious, and therefore void. It is apparent from the plan embodied in the act as already stated that its primary object is to relieve the distress of unemployment, and that the imposition of the tax upon employers is incidental".

That decision, and the opinion of the Michigan Supreme Court which followed it, rests upon the broad general principles stated by this Court when upholding, as against such an objection, the constitutionality of the Alabama unemployment compensation law,

> *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 509.

In the case of *Carmichael, supra,* appellant challenged the validity of that section of the Alabama act which

excluded from taxation all employers of less than eight workmen, on the ground that it denied equal protection of the laws.

Passing upon the validity of the tax *qua* tax, and leading to consideration of this classification (held reasonable), Mr. Justice Roberts, who spoke for the Court, said:

> "(p. 509) This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation (citing numerous decisions of this Court).
>
> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts wihch would support it (citing authorities).
>
> This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of

facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function".

This principle guided the Michigan Supreme Court to their decisions in the *Godsol* case and in the *Iron Street Corporation* case, *supra,* which was followed in the case at bar.

In the case of *Iron Street Corporation,* the court say:

"As pointed out in the *Godsol* case, one of the purposes of the section is to prevent employers from avoiding the obligations imposed by the statute, by dividing their businesses, and we stated there, and repeat now, that the classification thus imposed has a fair relation to the object of the legislation in question. The class created by statute includes employing units with less than eight employees which are owned or controlled by other employing units or by the same interests which own or control another employing unit, which, if treated as a separate unit with such other unit or units, employs eight or more. The tax that is imposed is levied equally upon all that come within this class (citing *Carmichael v. Southern Coal Co.,* 301 U.S. 495, 509)."

And, meeting the further objection (raised here as well) that the employers involved are not evading the tax, the court say:

"(p. 655) However, the possibility that evasive practices may be perpetrated is, as pointed out in

the Washington case, sufficient justification for the classification. The controlling test as to the meaning of a statutory provision is always the legislative intent when fairly ascertainable. . . .

Appellee also argues that in some of the cases cited there was an evident attempt to evade the effect of the statute. Whether such an intent in fact existed does not in any manner detract from the force of the reasoning and logic of the conclusion reached in the authorities cited''.

We, therefore, respectfully submit that, since there is a conceivable state of facts to support it, the classification in question cannot be said to be unreasonable, arbitrary or capricious, and there is no substance in petitioners' claim that the affiliate clause of the Michigan act denies them equal protection of the laws.

VIII

Relief Prayed.

For the reasons set forth in this brief, we respectfully submit that a writ of *certiorari* should be denied.

Respecfully Submitted,

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